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No. 92-1936

In The

Supreme Court of the United States

October Term, 1992

FRANKLIN YEAGER, WALTER BRANDT, DON C. YEAGER, and MARK YEAGER,

Petitioners,

v.

CITY OF McGREGOR, McGREGOR VOLUNTEER FIRE DEPARTMENT, and TOM KIRK,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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v.

CITY OF McGREGOR, McGREGOR VOLUNTEER FIRE DEPARTMENT, and TOM KIRK,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The McGregor Volunteer Fire Department, Defendant/Appellee in the courts below, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Franklin Yeager, Walter Brandt, Don C. Yeager and Mark Yeager ("the Petitioners"), and requests that this Court deny the petition and decline to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit that was entered on January 5, 1993.

STATEMENT OF THE CASE

McGregor Volunteer Fire Department ("the MVFD"), a private volunteer organization formed in 1920, operates in the city of McGregor, Texas, and the surrounding rural area. Individual volunteers comprise the MVFD's membership, and the group is primarily funded through voluntary donations and an annual charity barbecue. *(R. Vol. 4, MVFD Exhibits 1 and 2).*[1] Essentially, the MVFD is an informal association of individual volunteers.

The City of McGregor, Texas, is a home-rule municipality. *(R. Vol. 2 at 524).* At no time during its existence has the City created or operated a municipal fire department. *(R. Vol. 2 at 309).* The City of McGregor is not obligated under Texas law to provide fire service; instead, Section 342.011 of the Texas Local Government Code provides that a home-rule municipality *may* create a fire department. *(R. Vol. 1 at 624).* The City did not, and as a matter of law, could not, delegate fire fighting services to the MVFD, and the Fifth Circuit correctly held that the MVFD was not a state actor.

A. Statement of Facts

Prior to December 1, 1988, Franklin Yeager, Walter Brandt, Don C. Yeager and Mark Yeager were members of

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[1] Volume 4 of the Transcript consists of the Motions for Summary Judgment of Defendants Blake, Spradley and the MVFD, the Brief in Support of the Motion, and Petitioners' Response to the Motion. The pages of Volume 4 were not numbered. References to Volume 4 of the Transcript will specify the document referred to and, if necessary, the exhibit number to the document.

the MVFD. During the time that the Petitioners were members of the organization, they generated friction within the department and pursued a personal vendetta against certain officers of the MVFD. *(R. Vol. 4, MVFD Exhibits 1 through 6).* Within the department, morale decreased and discipline grew slack, a condition most members attributed directly to the presence and conduct of the Petitioners. *(R. Vol. 4, MVFD Exhibits 1 through 6).* Finally, on December 1, 1988, with a quorum present, MVFD members voted by secret ballot to withdraw the Petitioners' membership in the department. *(R. Vol. 4, MVFD Exhibit 3).*

During the many months before the vote revoking the Petitioners' memberships, the Yeagers and Brandt had been involved in a systematic campaign to disrupt and discredit the functioning of the department. Their tactics ranged from constant criticism of the leadership, to snickering and jeering during meetings, to wholesale disruption of drills such that the department could no longer hold meaningful practice exercises. *(R. Vol. 4, MVFD Exhibits 1 through 6).* Additionally, Petitioners criticized the way the department spent the money raised through the annual barbecue. *(R. Vol. 4, MVFD Exhibits 1 through 6).* And, although at that time the MVFD had some minorities among its membership, three of the Petitioners met with a reporter from a local newspaper and informed him of alleged racial discrimination within the department. *(R. Vol. 4, Yeagers' Exhibit 5; MVFD Exhibits 1 and 2).* About a month later, the Petitioners again publicly criticized the MVFD, renewing their unfounded allegations of financial improprieties within the department during a

meeting of the McGregor City Council. *(R. Vol. 4, MVFD Exhibit 1).*

After discipline, operations, and morale fell to an all time low within the membership, seven of the department's members requested a specially called meeting of the MVFD on December 1, 1988. *(R. Vol. 4, MVFD Exhibits 1, 2).* With a quorum of 15 present, and with Spradley, the president, abstaining, the overwhelming majority of the membership voted to remove the Yeagers and Brandt from the volunteer organization. *(R. Vol. 4, MVFD Exhibit 3).*

B. Course of Proceedings and Disposition of the Case

The Yeagers and Brandt filed their complaint in November of 1990 in the United States District Court for the Western District of Texas, against the City of McGregor, Texas, the MVFD, Tom Kirk, John Blake and Ronnie Moe Spradley.[2] The Petitioners alleged that they were voted out as members of the MVFD in retaliation for the public comments they made regarding alleged racial discrimination and financial improprieties within the MVFD, and that the vote to remove them from membership violated their First Amendment rights to free speech.

The district court granted the Defendants' Motions for Summary Judgment, concluding that: 1) there was no summary judgment evidence that the City of McGregor

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[2] John Blake, fire chief of the MVFD and Ronnie Moe Spradley, President of the MVFD, were dismissed from the lawsuit by the agreement of the parties. *Petitioners' Appendix B at 10.*

coerced or encouraged the actions of the MVFD's membership, and therefore the organization's actions could not be fairly attributed to the City *(Petitioners' Exhibit B at 5)*; 2) the uncontroverted summary judgment evidence established that the MVFD's interest in the promotion of efficient service, balanced against the Petitioners' First Amendment interests in making statements of public concerns, weighed in favor of the MVFD *(Petitioners' Exhibit B at 6-9)*; and 3) the summary judgment evidence failed to establish that any action of Kirk caused the Petitioners any injury, and no state action was present because the remainder of the alleged co-conspirators had been dismissed from the lawsuit. *(Petitioners' Exhibit B at 10-11)*.

The Yeagers and Brandt appealed to the Fifth Circuit, which affirmed the summary judgments on the basis that no state action was implicated by the vote of a private association of volunteer fire fighters to remove four individuals from its membership. *(Petitioners' Exhibit A at 19)*.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

Review by writ of certiorari is not warranted because the Fifth Circuit's opinion does not: 1) conflict with prior decisions of the Fifth Circuit; 2) decide a federal question in conflict with any applicable decision of this Court or the Texas Supreme Court; 3) so far depart from the accepted and usual course of judicial proceedings or sanctions as to call for the exercise of this Court's power of supervision; 4) decide an important question of federal law which has not been, but should be, settled by this Court; or 5) in any other way present an issue of sufficient merit or importance as to invoke this Court's power of discretionary review. Instead, the Fifth Circuit correctly affirmed the judgment of the district court and held that the MVFD was not a state actor.

ARGUMENT

A. Inaccuracies in the Petition for Writ of Certiorari

The Petition for Writ of Certiorari misstates or mischaracterizes both the law and the facts of this case in several important ways. First, the petition mischaracterizes the opinion of the Fifth Circuit. Contrary to Petitioners' claim, the Fifth Circuit did not *base* its opinion upon statements quoted from magazines and newspapers, but instead, in a well-reasoned and legally sound opinion, concluded from its review of cases from this Court, prior Fifth Circuit law, and Texas law that the MVFD was not a state actor. Petitioners' broad-stroke dismissal of the Fifth Circuit's opinion as being premised

solely upon "hearsay" is grossly inaccurate and mischaracterizes the Fifth Circuit's analysis supporting its opinion.

Second, in attempting to posture their case for discretionary review with this Court, Petitioners claim that the Fifth Circuit's opinion "ignores and conflicts" with prior Fifth Circuit opinions and Texas law. As discussed in greater detail below, no judicial or legislative body has ever decreed that fire prevention and protection is an *exclusive* governmental function of Texas municipalities. The City of McGregor has never undertaken the responsibility to operate a municipal fire department, nor has it acted to *delegate* that activity to any entity, including the MVFD. The City could not delegate a function which it did not otherwise have the legal obligation to perform.

Third, Petitioners inaccurately state that no defendant raised the issue that providing fire protection was not a traditionally exclusive governmental function at the trial court level or in their appellate briefs. In a Motion to Dismiss under Federal Rules of Civil Procedure 12(b) which was overruled by the district court, the MVFD asserted that it was not a state actor. *(R. at 31-32; 150-60).* The City's appellate brief to the Fifth Circuit specifically addressed the issue. *(Brief of Appellee City of McGregor at 2).* The MVFD expressly adopted the City's argument. *(Brief of Appellee McGregor Volunteer Fire Department at 7, n. 2).* The issue of state action did not arise in a vacuum during the drafting of the panel's opinion.

Fourth, Petitioners incorrectly state that the district court "concluded, without deciding" that the MVFD was

a state actor. Actually, the lower court stated that it "*assumes* without deciding that the V.F.D. is a state actor." *(Petitioners' Exhibit B at 6)* (emphasis added). It was this assumption concerning the threshold inquiry – whether there was any involvement of a state actor – that prompted the Fifth Circuit's lengthy analysis, since they feared that the uncorrected assumption might needlessly expose other volunteer fire departments around the country to Section 1983 lawsuits. *(Petitioners' Exhibit A at 5).*

Finally, the Petitioners inaccurately characterize the Fifth Circuit's opinion as one having "enormous implications" that would somehow shield those whose rights are trampled by " 'private entities' to which have been delegated the traditionally exclusive governmental functions of municipalities." Yet the panel's opinion clearly limited the scope of the decision to the MVFD particularly, saying: "On examining the question, we demur from establishing a broad rule concerning volunteer fire departments in general; but conclude that under present Supreme Court authority, cases from this circuit and Texas law, MVFD was not a state actor." *(Petitioners' Exhibit A at 5).* And later, the Court reiterated that "under a *fact-specific* review, the MVFD does not appear to perform a 'power traditionally exclusively reserved to the state.' " *(Petitioners' Exhibit A at 8)* (emphasis added). The opinion clearly limits the scope of its application and the Petitioners' fears are unfounded.

B. Review is Not Warranted In This Case Because The Opinion of the Fifth Circuit Was Correctly Decided

The Fifth Circuit's opinion in this case focuses upon the fundamental inquiry in any §1983 case – whether the alleged infringement of a constitutional right arose from conduct fairly attributable to the state. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 938, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482, 496 (1982). Absent the involvement of a state actor, no wrong capable of redress under §1983 occurred.

Petitioners argue that the provision of fire protection to the citizens of the City of McGregor is an "exclusive government function" and that the MVFD performed the services only through the delegation of that function from the City. However, as the Fifth Circuit noted, the relevant inquiry is not whether a private group serves a public function, but whether that particular function is exclusively "the prerogative of the state." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842, 102 S.Ct. 2764, 2772, 73 L.Ed.2d 418, 428 (1982) (*quoting Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352, 95 S.Ct. 449, 454, 42 L.Ed.2d 477, 485 (1974)).

1. Prior Authority From This Court

Contrary to the Petitioners' assertions otherwise, this Court has not determined that the provision of fire protection is an exclusive governmental function of a municipality. Petitioners cite *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978); *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49

L.Ed.2d 245 (1976); and *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (Powell, J. dissenting) as supporting authority. *Garcia* rejected the "*traditional* government function" rule of state immunity from FLSA wage and over-time regulations and overruled *National League of Cities*. 469 U.S. at 557. Neither *Garcia* nor *National League of Cities* defined fire protection as an *exclusive* governmental function; instead this Court noted that fire protection is an activity that is *traditionally* carried on by governmental entities. *See, e.g., National League of Cities*, 426 U.S. at 851 ("These activities [fire prevention, police protection, sanitation, public health and parks and recreation] are typical of those performed by state and local governments . . . ") *and* 855 ("[fire protection] provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens.")

This Court's discussion in *Flagg Brothers* did center around the governmental functions "exclusively reserved to the State," but in the context of a state's alleged delegation of the power to resolve private disputes. *436 U.S. at 157*. Fire protection services were discussed only as an example of other areas of state and municipal functions.

As this Court observed in *Flagg Brothers*, the state action question is situationally specific and courts must review the history, tradition and local law surrounding the particular activity to determine whether the defendant is a state actor. *436 U.S. at 163-64*. That is precisely what the Fifth Circuit did in this case, concluding that under the fact-specific review, the MVFD "does not appear to perform a 'power traditionally exclusively

reserved to the state.' " *(Petitioners' Exhibit A at 8, citing Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352, 95 S.Ct. 449, 454, 42 L.Ed.2d 477, 485 (1974)).

2. Texas Law

Nothing in Texas law requires the City of McGregor, a home-rule municipality, to provide fire protection to its citizens; instead, the authorizing statute states that "A home-rule municipality *may* provide for a fire department." *Tex. Loc. Gov't Code Ann. §342.011* (Vernon 1988). The Texas legislature's choice of permissive language must be given its normal meaning. *Tex. Gov't Code Ann. §312.002* (Vernon 1988).

This result is not altered by the language of §101.0215 of the Texas Civil Practice & Remedies Code, contrary to Petitioners' assertions. Section 101.0215 provides an illustrative list of functions which may form the basis of governmental liability under the Texas Torts Claims Act, as long as the activity falls within the parameters of the three areas of the Act in which the government has waived sovereign immunity. *McKinney v. City of Gainesville*, 814 S.W.2d 862, 865 (Tex. App. – Fort Worth 1991, no writ). The inclusion of police and fire protection within §101.0215 does not mean that governmental immunity is waived under the Texas Torts Claims Act per se for actions within that category, nor can the statutory section be interpreted so broadly as to create a determinative list of "state action" for §1983 purposes. To do so would not only implicate §1983 liability for all activities listed – including the operation of hospitals, parks, museums, cemeteries, libraries, senior citizen centers, recreational

facilities and parking facilities (all of which can be operated on a private basis in the state of Texas without the delegation of governmental responsibility) – but would also place the statute in square contradiction with the Local Government Code which makes the provision of fire protection optional for home-rule municipalities.

No Texas case has held that the provision of fire protection services is an exclusive function of a Texas home-rule municipality such as the City of McGregor. The cases relied upon by the Petitioners do not stand for such a proposition; they either do not mention fire protection at all or merely acknowledge that under the specific factual situations, the provision of fire protection is well within the police powers of a municipality or city in Texas.[3]

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[3] *See, e.g. City of Houston v. Southwest Concrete Const., Inc.*, 835 S.W.2d 728 (Tex. App. – Houston [14th Dist.] 1992, no writ) (fire protection not mentioned in text); *Genzer v. City of Mission*, 666 S.W.2d 116 (Tex. App. – Corpus Christi 1983, writ ref'd n.r.e.) (members of the volunteer fire department served in a governmental capacity under article 9205 of the Texas Revised Civil Statutes (now repealed) to the extent they worked under the supervision of the local police department and the fire chief, an employee of the City of Mission); *City of Coleman v. Rhone*, 222 S.W.2d 646 (Tex. Civ. App. – Eastland 1949, writ ref'd) (interpreting city ordinance regarding access to street from local fire station based upon the city's inherent police powers); *City of McAllen v. Morris*, 217 S.W.2d 875 (Tex. Civ. App. – San Antonio 1948, writ ref'd) (no discussion of whether fire protection is an exclusive governmental function of the city or the impact of §342.011 of the Texas Local Government Code or its predecessor statute); *City of Crosbyton v. Texas-New Mexico Util. Co.*, 157 S.W.2d 418 (Tex.Civ. App. – Amarillo 1941, writ ref'd w.o.m.) (fire protection not mentioned in text).

3. Fifth Circuit Precedent

The Fifth Circuit cases cited by the Petitioners do not state that fire prevention and protection is an exclusive governmental function of the City, nor were any of the cases decided in the context of a §1983 cause of action.[4] None of the decisions address the Texas legislature's language in the Local Government Code that home-rule municipalities like the City of McGregor may provide fire protection at their option, and none conflict with the Fifth Circuit panel's opinion in this case. The Fifth Circuit simply has not made a determination in prior cases which conflicts with the present opinion.

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[4] *Wilcox v. Terrytown Fifth Dist. Volunteer Fire Dept. Inc.*, 897 F.2d 765 (5th Cir. 1990) (Louisiana volunteer fire department considered a public agency for purposes of the FLSA under the specific facts of the case because the department was required to submit its annual financial report to the parish for inclusion in the parish annual budget, and under the terms of its contract with the parish was directly under the governing authority of the Jefferson Parish Council); *San Antonio Metro. Transit Auth. v. McLaughlin*, 876 F.2d 441 (5th Cir. 1989) (fire protection not discussed in opinion concerning the recoverability of attorney's fees by a litigant in an action under the FLSA); *Garcia v. San Antonio Metro. Transit Auth.*, 838 F.2d 1411 (5th Cir. 1988) (issue on appeal after remand was whether the Supreme Court's opinion in *Garcia v. San Antonio Metro. Transit Auth.* should be retroactively applied); and *Peel v. Florida Dept. of Transp.*, 600 F.2d 1070 (5th Cir. 1979) (determining whether an employee of the Florida Department of Transportation, an agency of the state, could bring suit against the DOT for violation of the Veteran's Reemployment Rights Act).

4. *Janusaitis v. Middlebury Volunteer Fire Department*

Finally, as noted by the Fifth Circuit, Petitioners' reliance upon *Janusaitis v. Middlebury Volunteer Fire Dept.*, 607 F.2d 17 (2nd Cir. 1979) is misplaced because the case is both factually and legally distinct from the present situation. The closest analogy of *Janusaitis* to this case is the court's ruling that upon balancing the plaintiff's abrasive and personally motivated conduct against the particular need for close and harmonious relations among the members of the volunteer fire department, the dismissal did not violate the plaintiff's First Amendment rights. The District Court in this case correctly premised its opinion upon a similar analysis.

The Second Circuit determined that the volunteer fire department involved in *Janusaitis* was a state actor based upon an analysis of several Connecticut statutes which differ markedly from §342.011 of the Texas Local Government Code. Additionally, the Town Board of Selectmen had the final vote of approval over some of the personnel of the department. *607 F.2d at 21-22.* And, as noted by the Fifth Circuit, the Second Circuit's determination that the volunteer fire department carried out an exclusive function of government was decided prior to *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) and *Rendell-Baker*, 457 U.S. 830. Furthermore, the ambiguity of the legal rationale used by the Second Circuit has rendered its subsequent application problematic. *(See Petitioners' Exhibit A at 12-13 and n. 6).* *Janusaitis* is indeed "less than compelling precedent" to apply to the

McGregor Volunteer Fire Department. *(Petitioners' Exhibit A at 13).*

5. Summary

The Fifth Circuit correctly held that under the facts and the law applicable to this case, fire protection is not an exclusive governmental function to be imposed upon the City of McGregor, a home-rule municipality under the laws of the State of Texas, and that the MVFD is not a state actor for purposes of the Petitioners' suit under §1983. Furthermore, as noted by the appellate court, the MVFD would not be deemed to be a state actor under any *other* formulas developed by this Court. (*Petitioners' Exhibit A at 13, citing Jackson*, 419 U.S. at 351; *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 556, 107 S.Ct. 2971, 2991, 97 L.Ed.2d 427, 460-61 (1987) (Brennan, J. dissenting)). The MVFD was not a state actor and the Fifth Circuit correctly affirmed the summary judgment granted by the district court in the department's favor.

CONCLUSION AND PRAYER

The McGregor Volunteer Fire Department, a volunteer organization of individuals, chose to revoke the membership of four persons whose conduct had seriously jeopardized the atmosphere of discipline and camaraderie so essential to the functioning of a fire-fighting team. Consequently, the City of McGregor, the MVFD and

members of the department found themselves as defendants in a lawsuit alleging violations of the Petitioners' constitutional rights. Under Texas law, the City of McGregor was not required to provide fire protection, and the MVFD's fire protection activities cannot be fairly characterized under the uncontroverted evidence of this case as an exclusive governmental function of the City of McGregor, Texas. No state action was implicated when the majority membership of the volunteer fire department voted overwhelmingly to remove the unwelcome influence of the Petitioners from their ranks. The Fifth Circuit properly affirmed the summary judgments granted by the District Court of the Western District of Texas and correctly held that the Petitioners did not raise a fact issue supporting their assertion that the MVFD was a state actor or an agency of the City of McGregor.

Under any set of guidelines used by this Court for deciding whether to exercise its judicial discretion and grant review on writ of certiorari, this case does not warrant such review. The Petitioners fail to demonstrate the existence of any issue worthy of writ of certiorari from this Court. The district court's granting of the defendants' motions for summary judgment was proper, and the Fifth Circuit correctly affirmed that judgment. Accordingly, the McGregor Volunteer Fire Department, Respondent, asks this Court to deny the petition for a

writ of certiorari, and further requests all other relief to which it may be entitled.

June 25, 1993.

Respectfully submitted,

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